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No. 90-1733

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. BROWN AND WELLINGTON MITCHELL, PETITIONERS

v.

MICHAEL P.W. STONE, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, authorizes a court to award back pay as a remedy for employment discrimination by the federal government, but does not waive sovereign immunity with respect to prejudgment interest on such an award. The question presented is whether the Back Pay Act, 5 U.S.C. 5596(b), waives the sovereign immunity of the United States with respect to prejudgment interest on a back pay award, in an action under Title VII, that is based on a determination that the plaintiff would have obtained a discretionary promotion in the absence of unlawful discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 918 F.2d 214. The opinion of the district court in *Brown* v. *Marsh* (Pet. App. 25a-39a) is reported at 713 F. Supp. 20. The opinion of the district court in *Mitchell* v. *Secretary of Commerce* (Pet. App. 51a-64a) is reported at 715 F. Supp. 409. (The two cases were consolidated in the court of appeals.)

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1990. A petition for rehearing was denied on February 12, 1991. The petition for a writ of certiorari was filed on May 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are federal employees who brought separate actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. In both cases, the district court found that the government had engaged in discrimination prohibited by Title VII. The district court awarded petitioner James E. Brown promotions retroactive to 1975 and back pay. Pet. App. 2a, 34a-35a, 39a. The court awarded petitioner Wellington Mitchell a promotion retroactive to 1980 and back pay. *Id.* at 2a, 65a-66a.

Both petitioners sought prejudgment interest on their back pay awards. In general, "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest," *Library of Congress* v. *Shaw*, 478 U.S. 310, 311 (1986), and Title VII itself does not "waive the Government's traditional immunity from interest," *id.* at 323. Petitioners argued, however, that the Back Pay Act furnished the requisite waiver. That statute provides, in pertinent part:

> (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination * * * is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee –
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect –
>
> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if

> the personnel action had not occurred, less any amounts earned by the employee through other employment during that period[.] * * *
>
> * * * * *
>
> (2)(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

5 U.S.C. 5596(b).[1] As the result of a 1978 amendment, the term "personnel action" includes "the omission or failure to take an action or confer a benefit." 5 U.S.C. 5596(b)(4).

In both cases, the district court denied petitioners' claims for prejudgment interest. Pet. App. 35a-37a, 53a-57a. Although it was "prepared to accept * * * as a general proposition" that the Back Pay Act was potentially applicable to back pay awards under Title VII (*id.* at 54a), the court concluded that the Act was inapplicable to back pay arising from the denial of a promotion. The court reasoned that withholding a promotion does not result in the "withdrawal or reduction" of an employee's compensation. *Id.* at 36a-37a, 56a.

2. The court of appeals consolidated the two cases and affirmed. Pet. App. 1a-22a. At the outset, the court rejected the government's contention that the Back Pay Act may not be employed in Title VII actions to supplement the relief authorized by Title VII itself. The court ruled that the two statutes "are most sensibly read as complementary" and that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards." *Id.* at 7a.

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[1] The provision authorizing payment of prejudgment interest, 5 U.S.C. 5596(b)(2)(A), was enacted in 1987. Pub. L. No. 100-202, § 623, 101 Stat. 1329-428 to 1329-429. That provision applies to all actions pending on its effective date. *Ibid.*

Two members of the panel held, however, that the Back Pay Act did not authorize payment of prejudgment interest on petitioners' back pay awards. The majority interpreted the Act, as amended in 1978, "to mean that if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief." Pet. App. 12a-13a. Because petitioners' back pay awards involved discretionary, competitive promotions, the majority concluded, the Back Pay Act was inapplicable, and petitioners could not rely on its waiver of sovereign immunity from an award of interest. *Id.* at 13a-14a.

In order to recover under the Act, the majority explained, a federal employee "must be found 'to have been affected by an unjustified or unwarranted personnel action *which has resulted in the withdrawal or reduction of all or part of [his or her] compensation.*'" Pet. App. 8a (quoting 5 U.S.C. 5596(b)(1)) (bracketed material added by court). The majority noted that prior to the 1978 amendment, this Court had construed the Back Pay Act to "grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." Pet. App. 8a (quoting *United States* v. *Testan*, 424 U.S. 392, 407 (1976)). The 1978 amendment, the majority determined, was not intended to extend the statute to claims that *discretionary* promotions had been unlawfully withheld, but rather to mandatory promotions—promotions that were part of the employee's "duly appointed emoluments."

The majority explained that "the 1978 amendment must be read in the context of the Act as a whole. The amendment's clarification of the term 'personnel action' to include 'failure . . . to confer a benefit' left untouched the condition that the employee suffer a 'withdrawal' of or 'reduction' in compensation." Pet. App. 9a. Noting that waivers of sovereign immunity must be strictly construed, the

majority declined to construe the Act to require "that any unlawful failure to promote involves the 'withdrawal or reduction' of compensation because the employee wrongfully denied promotion does not receive money that he or she otherwise would have." *Ibid.*

Rather, the majority found, "Congress intended the 1978 amendment to cover unlawful failures to promote of a certain, precisely limited, kind." Pet. App. 10a. The majority found that the 1978 amendment was intended to codify an interpretation, reflected in contemporaneous administrative rulings and regulations, that the statute "encompasses non-competitive, mandatory promotions, not the competitive promotions at issue here." *Ibid.* The majority found additional support for this interpretation in *Spagnola* v. *Stockman*, 732 F.2d 908 (Fed. Cir. 1984). Pet. App. 12a-13a.

Judge Wald dissented from the determination that the Back Pay Act is inapplicable to discretionary promotions. She would have held that the 1978 amendment extended the scope of the Back Pay Act to "all cases involving an 'unjustified or unwarranted' denial of promotion under applicable law, regulation, or collective bargaining agreement, including discriminatory denials of promotions under Title VII." Pet. App. 22a.

ARGUMENT

Although it remains our position that the Back Pay Act may not properly be employed to supplement the remedies available under Title VII, the court of appeals was fully justified in refusing to extend the Act to the discretionary promotions at issue in this case in any event. There is no conflict among the courts of appeals on whether the Back Pay Act applies in this setting. Consequently, further review is not warranted.

1. a. "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress* v. *Shaw*, 478 U.S. at 314. Indeed, in the context of this no-interest rule, the general rule that waivers of sovereign immunity are narrowly construed bears "an added gloss of strictness." *Id.* at 318. There can be

> no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Ibid. (quoting *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947)).

When it extended Title VII to federal government employment, "Congress did not waive the Government's traditional immunity from interest." *Library of Congress* v. *Shaw*, 478 U.S. at 323. Petitioners seek to compensate for that omission by engrafting the Back Pay Act's provision for prejudgment interest onto Title VII. By its terms, however, the former statute provides for back pay (and thus for prejudgment interest) only in the event of "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C. 5596(b)(1). That language, even as supplemented by the 1978 amendment to the statute, cannot fairly be read to encompass the denial of a discretionary promotion.

In *United States* v. *Testan*, 424 U.S. 392, 405-407 (1976), the plaintiffs alleged that their jobs had been improperly classified—*i.e.*, that they were performing duties and

responsibilities characteristic of GS-14 positions, but had been classified only as GS-13 employees. This Court held that the Back Pay Act was inapplicable to such a claim. After reviewing the history of remedies available to federal employees for allegedly unlawful personnel actions, the Court noted that the general rule has been "that the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade." *Id.* at 406. The Court found that the Back Pay Act "did not override this rule, or depart from it." *Ibid.* Rather, the Court concluded, "the Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." *Id.* at 407.

b. Petitioners do not contend, nor could they, that their claims would fall within the Back Pay Act as construed in *Testan*. Notwithstanding the district court's finding that they would have attained higher grades in the absence of discrimination, they were not "subjected to a reduction in their duly appointed emoluments or position." Rather, petitioners' basic contention is that the 1978 amendment to the Act—which defined "personnel action" to include "the omission or failure to take an action or confer a benefit," 5 U.S.C. 5596(b)(4)—abrogated the general limitation recognized in *Testan*.[2] As the majority noted, that contention overlooks the fact that the 1978 amendment made no change in the operative statutory language. It is still necessary, as before, that an unlawful personnel action result in a "withdrawal or reduction" of the employee's compensation.

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[2] The holding in *Testan* was codified in 5 U.S.C. 5596(b)(3).

The legislative history of the amendment confirms, moreover, that the 1978 amendment was not intended to extend the statute to claims involving discretionary promotions. Rather, the amendment was intended to codify an interpretation of the statute "that ha[d] been given the Back Pay Act * * * by the Comptroller General and the Civil Service Commission through decisions and regulations." S. Rep. No. 969, 95th Cong., 2d Sess. 114 (1978). Under that interpretation, the Act had been held to apply to unlawful failures to award "noncompetitive, mandatory promotions" (Pet. App. 10a). That type of personnel action, because it entails withholding of compensation that an employee is legally entitled to receive, does result in the "withdrawal" of compensation that is legally owed.

For instance, in *In re John Cahill*, 58 Comp. Gen. 59, 61-62 (1978), the Comptroller General stated (emphasis added):

> [W]hile employees have no vested right to promotion at any specific time, an agency, by negotiation of a collective-bargaining agreement or by promulgation of a regulation, *may limit its discretion so that under specified conditions it becomes mandatory to make a promotion* on an ascertainable date.
>
> * * * * *
>
> The violation of such a *mandatory provision* in a negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act * * *.

In the same vein, Civil Service Commission regulations in effect in 1978 defined an "unjustified or unwarranted personnel action" to include an "omission * * * which it is subsequently determined violated or improperly applied the

requirements of a *nondiscretionary provision*, * * * , and thereby resulted in the withdrawal, reduction, or denial of all or any part of the [compensation] otherwise due an employee." 5 C.F.R. 550.802 (1978) (emphasis added). "Nondiscretionary provision" was defined by those regulations to mean "any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that *requires an agency to take a prescribed action under stated conditions or criteria.*" *Ibid.* (emphasis added).[3] This interpretation of the Back Pay Act, which the 1978 amendment codified, limits the statute to promotions that an agency is legally obligated to award.[4]

The court-ordered promotions (and accompanying back pay) that petitioners received under Title VII are not of that nature. The district court did not find that any statute, regulation, or collective bargaining agreement required the government to promote petitioners to the positions they

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[3] The current regulations define "unjustified or unwarranted personnel action" as (5 C.F.R. 550.803):

> an act of commission or an action of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

[4] The agency decisions cited by petitioners (Pet. 18-19, 25 & n.34) are entirely consistent with *In re John Cahill*, *supra*. For instance, in *Veterans Administration Hosp.*, 4 F.L.R.A. 419, 424 (1980), the FLRA held that the Back Pay Act applied to a case in which the agency violated a collective bargaining agreement mandating merit promotions. Accord 54 Comp. Gen. 312 (1974) (reprinted at Pet. App. 77a) ("agency failed to carry out what had become, through its inclusion in a collective bargaining agreement, a non-discretionary agency policy").

attained as a result of the court's decrees. Rather, after concluding that the government had discriminated against petitioners, the court made findings regarding how the government probably would have acted had there been no discrimination. A *reconstruction* of how the government would have acted toward petitioners, undertaken for the purpose of fashioning remedial decrees eliminating the effects of past discrimination, is simply not the same thing as a legal determination that the government had a mandatory obligation to award a promotion.

Petitioners' failure to recognize that fundamental distinction is a flaw that pervades their argument. It is not enough for petitioners to demonstrate that the Back Pay Act has been applied in situations in which a court has found that a plaintiff "would have" obtained a particular position "but for" a failure to comply with a statute. See, *e.g.*, Pet. 12, 15, 22-23. That description fits two very different scenarios: (1) a situation in which a court finds that an agency violated a statute or regulation prescribing a particular course of action and (2) a situation in which a court finds that an agency has allowed an impermissible consideration to enter a discretionary decision and, in fashioning a remedy, undertakes to reconstruct what would have happened if that consideration had been absent. The administrative interpretations embodied in the 1978 amendment were limited to the first scenario. Petitioners' claims follow the second. Nothing in the language or legislative history of the 1978 amendment to the Back Pay Act suggests an intention to encompass both types of claims.[5]

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[5] In particular, the fact that the Senate Report accompanying the 1978 amendment suggested an intention to cover a "denial [of], or denial of an increase in," an employee's pay (S. Rep. No. 969, *supra*, at 115) does not suggest that Congress envisaged claims like petitioners'. That recitation of the types of actions encompassed by the amendment is

c. Contrary to petitioners' contention (Pet. App. 12-13, 22-23), there is no conflict between the decision in this case and decisions of other courts of appeals. No court of appeals has awarded relief under the Back Pay Act to a plaintiff in petitioners' position. Moreover, the courts of appeals have been consistent in their interpretation of the Back Pay Act.

In *Naekel* v. *Department of Transportation*, 850 F.2d 682, 683 (1988), the Federal Circuit held that an air traffic controller who had been unlawfully discharged was not entitled to back pay corresponding to discretionary promotions that he argued he would have received had he remained continuously employed. The court explained that the controller "neither demonstrated that any statute, regulation or collective bargaining agreement mandated his promotion to these levels during the interim period, nor presented facts that would establish a clear entitlement to retroactive promotions." To sustain that burden, the court continued, the plaintiff was required to demonstrate "a *reduction* in his duly *appointed* or *authorized* position caused by the adverse personnel action." *Ibid.*[6]

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entirely consistent with coverage of mandatory promotions, but exclusion of discretionary promotions.

The 1978 amendment could not have been drafted with the specific objective of enhancing the relief available under Title VII. It was not until 1987 that the Back Pay Act was amended to provide for prejudgment interest. See note 1, *supra*. Until that point, the Back Pay Act authorized no relief that was not already available to successful Title VII litigants under Title VII.

[6] *Kellus* v. *United States*, 13 Cl. Ct. 538 (1987), has been overruled to the extent it is inconsistent with *Naeckel*.

As petitioner notes, a few district court decisions have relied on the Back Pay Act as a basis for awarding prejudgment interest in actions under Title VII. *Smith* v. *Brady*, 744 F. Supp. 925 (N.D. Cal. 1990); *Parker* v. *Burnley*, 693 F. Supp. 1138, 1153 (N.D. Ga. 1988). See also *Rollins* v. *Bennett*, 48 F.E.P. Cas. (BNA) 1172, 1175 (W.D. Wash. 1988) (ADEA action). But see *Hearn* v. *Turnage*, 739 F. Supp. 1312,

Similarly, in *Olsen* v. *Arrington*, 621 F.2d 363 (10th Cir. 1980), an employee who had won reinstatement argued that he would have been promoted had he not been unlawfully separated from the government. The Tenth Circuit found that the Back Pay Act did not reach such a claim, explaining (*id.* at 366):

> We do not think [the Act] gives the courts the power * * * to intrude into areas within an agency's discretion. We find, therefore, that the [lower] court had no power to grant plaintiff a retroactive promotion, nor to award back pay at a rate higher than for the grade level held by him at the time of separation.

Accord *Spagnola* v. *Stockman*, 732 F.2d at 912 ("the 1978 amendment [to the Back Pay Act] was *not* designed to provide payment for all actions which should or might well have been taken, but only for those payments or benefits which were *required* by law"); *Power* v. *United States*, 597 F.2d 258, 262 (Ct. Cl. 1979), cert. denied, 444 U.S. 1044 (1980).

The standards applied in these cases are consistent with the majority's interpretation of the Back Pay Act in this case. There is no conflict among the courts of appeals calling for this Court's review.

2. The judgment below may also be sustained on the alternative ground that the Back Pay Act is not available in any event to supplement the relief available under Title VII. See *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382 (6th ed. 1986). As we argued below and continue to believe, the Back Pay Act authorizes payment of prejudgment interest only on sums paid "under" the Back Pay Act itself. See 5 U.S.C. 5596(b)(2)(A) (authorizing payment of interest on "[a]n amount payable under paragraph (1)(A)(i)

1313 (E.D. Wis. 1990). A conflict arising only from district court decisions, however, does not ordinarily warrant this Court's review.

of this subsection"). Employment discrimination awards, however, are paid "under" the pertinent employment discrimination statute and not "under" the Back Pay Act. Indeed, in *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." See *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979). Thus, a Title VII award can never be deemed to be made "under" any remedial scheme other than that set forth in Title VII. Since the Back Pay Act is not available to a Title VII litigant, its waiver of sovereign immunity is also not available.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

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* The Solicitor General is disqualified in this case.

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